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NO. 631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

LOUISIANA POWER & LIGHT COMPANY,
Petitioner

vs.

CITY OF THIBODAUX,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court first entered herein in 1957 is reported at 153 F. Supp. 515. That of the Court of Appeals on the appeal therefrom appears at 255 F.

2d 774. This Court's opinion on certiorari from the decision of the Fifth Circuit Court of Appeals will be found at 360 U.S. 25. The Louisiana First Circuit Court of Appeal's decision which followed this Court's opinion is reported at 126 So. 2d 24. The Louisiana Supreme Court denied certiorari. The more recent opinion of the District Court in this case appears at 225 F. Supp. 657. The Court of Appeal's opinion of which petitioner Louisiana Power & Light Company seeks review is published at 373 F. 2d 870.

QUESTIONS PRESENTED

1. Whether petitioner's parish (county) police jury franchise expressly excluding any operations "within the limits of any incorporated city, town or village" here entitles petitioner, on the basis of impairment of the obligation of contract, to any award

for the "present value of future growth" upon the expropriation by an incorporated city of petitioner's facilities located within the extended limits of the city.

2. Alternatively to Question 1, whether judicial construction of a state statute ante-dating petitioner's franchise in such manner as to deny petitioner an award for the "present value of future growth" within an area annexed into a municipality constitutes a Constitutionally protected impairment of the obligation of contract.

3. Whether the Federal practice under Rule 71A, F. R. Civ. P., controls the making of a post-judgment deposit of the amount of an expropriation award in a proceeding for condemnation under a state's power of eminent domain.

4. Whether petitioner, not having appealed from the judgment of the district court, may enlarge its rights or lessen those of respondent with regard to

whether there existed "necessity" for expropriation by respondent of petitioner's facilities.

5. Alternatively to Question 4, whether there is required remand to the district court for further consideration of the "necessity" of the expropriation.

STATEMENT

By its petition for expropriation (R. 6) filed February 4, 1957, in the 17th Judicial District Court for the Parish of Lafourche, Louisiana, the City of Thibodaux (hereinafter referred to as "City"), a duly incorporated Louisiana municipality, initiated these proceedings for the expropriation of the electrical distribution system of Louisiana Power & Light Company (hereinafter referred to as "power company") located within the City's corporate limits. The action was instituted pursuant to the express authorization of Louisiana Revised Statutes 19:101. The power company

removed the suit (R. 1) to the United States District Court for the Eastern District of Louisiana under the diversity of citizenship jurisdiction provisions of 28 U.S.C. 1441. Defendant answered (R. 15), and it was stipulated by the parties "that the seizure under Rule 71(a), F.R. Civ. P., will be used and that a commission of three will be appointed to assess value ****" (R. 27). The checkered history of this litigation then saw the district court stay further federal proceedings so that the state courts could pass upon the hitherto uninterpreted Louisiana statute authorizing the expropriation (La. R.S. 19:101) in the light of the power company's numerous defenses, including asserted impairment of the obligation of contract (R. 73; City of Thibodaux v. Louisiana Power & Light Co., E.D. La. 1957, 155 F. Supp. 515). After reversal of the abstention order by the

Court of Appeals, City of Thibodaux v. Louisiana Power & Light Co., C.A. 5 1958, 255 F. 2d 774, this Court granted certiorari, itself reversed the Court of Appeals decision, and held that the doctrine of abstention found proper application in this proceeding. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). That the City could expropriate the property in question was confirmed by the state tribunals, City of Thibodaux v. Louisiana Power & Light Co., La. App. 1st Cir. 1960, 126 So. 2d 24, cert. den. The case then returned to the United States District Court for the Eastern District of Louisiana, New Orleans Division, for determination of the compensation due the power company for the facilities expropriated.

Among the points at issue in the District Court was whether petitioner was entitled to an award for the

"present value of future growth", to be included in evaluation of the franchise. The Commission appointed to assess valuation concluded that it was not, and that there was no evidentiary basis for such an award. R. 874. Judge J. Skelly Wright, then presiding, agreed. R. 921. Following elevation of Judge Wright to the Court of Appeals, Judge Frank B. Ellis, at a motion for a new trial, received certain evidence proffered by petitioner with regard to its asserted entitlement to an award for future growth value. R. 943. On the basis that such an award was justified, Judge Ellis increased the award of the Commission, in which Judge Wright had concurred, from $599,640.00 to $1,379,558.00, all of the $781,918.00 difference being attributed to "present value of future growth" as an aspect of franchise value. R. 1045, 1048. The Fifth Circuit Court of Appeals, Judges Brown, Coleman, and Bell,